Filed 7/9/19 Fayek v. Public Employees' Retirement System CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

ABDEL-MOATY FAYEK, Plaintiff and Appellant, v. PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Defendant and Respondent.	C077689 (Super. Ct. No. 159799)
ABDEL-MOATY FAYEK, Plaintiff and Appellant, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY et al., Defendants and Respondents.	C078733 (Super. Ct. No. 159799)

The California Public Employees' Retirement System (PERS) is a retirement system for employees of the state and participating local agencies. (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316.) PERS determines an employee's retirement benefits based on his years of service (known as service credit), final compensation, and age at retirement. (*Ibid*.) The system is funded by employer and employee contributions. (*Ibid*.) PERS has a fiduciary duty to its members, but it also has a duty to follow the law, and it cannot provide a member with a right or status not otherwise available under the law. (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544.)

Plaintiff Abdel-Moaty Fayek worked as member of the computer science faculty at California State University at Chico, California. He began working for the university in 1983. As an employee of the university, plaintiff was a member of PERS. In 1997 plaintiff entered into an agreement with the trustees of the university (CSU) and the CSU Chico Research Foundation (the Foundation) whereby he would no longer teach but would receive a salary from CSU that he would repay back to the Foundation. He also paid the Foundation an administration fee. During the time he was not working as a faculty member at CSU, plaintiff started and ran computer-related businesses. Plaintiff's understanding was that despite the fact he was not working for CSU, he would continue to accrue PERS service credit as a CSU faculty member. This arrangement continued until 2006, when plaintiff returned to his faculty duties.

CSU later informed plaintiff it had determined he was not entitled to PERS service credit during the term of the agreement because he had not been working for CSU. Plaintiff eventually filed this action for breach of contract and related claims, and for defamation. He named CSU, the Foundation, PERS, and three individual defendants who were CSU employees. Defendants demurred to plaintiff's first two complaints.

The trial court sustained defendants' demurrer to all but one cause of action in the second amended complaint. That cause of action was for money had and received,

specifically the money plaintiff paid to CSU as an "administrative fee." CSU made an offer of settlement for that cause of action, and plaintiff accepted the offer. Judgment was entered against plaintiff on all causes of action except the cause of action for money had and received.

In this consolidated appeal we shall conclude that the judgment on the cause of action for money had and received is not independent of plaintiff's other contract-related claims, thus plaintiff has waived appeal of his contract-related claims by accepting the benefit of a dependent part of the judgment. We further conclude plaintiff's defamation cause of action fails because it does not allege a defamatory statement or facts showing actual malice sufficient to overcome the common interest privilege. Finally, the actions against PERS fail because PERS is governed by statute and has no obligation to award service credit to plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's second amended complaint alleged that he became an employee of CSU in 1983. In 1997, his supervisor, Dr. Ken Derucher, proposed that plaintiff enter into a self-funded buyout agreement, whereby plaintiff would take a leave of absence during which he would engage in professional development activity in his field of interest (computers), would remain an employee of CSU, and would accrue service credit for his retirement benefits. CSU would continue to pay plaintiff's salary and provide benefits, and plaintiff would reimburse CSU for his salary and benefits via payment to the Foundation, an "auxiliary organization" as defined in Education Code section 89901.[1]

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[1] Education Code section 89901 provides in pertinent part that an auxiliary organization includes an entity whose purpose is to promote or assist any campus of CSU or the trustees of CSU to receive funds to be used to benefit the campus or trustees, and whose directors, governors, or trustees are appointed by a CSU official or selected from the student body, faculty, trustees, or administrative staff of CSU.

Plaintiff accepted the agreement, which was renewed from time to time through the fall semester of 2006, after which plaintiff returned to his full-time faculty duties.

Plaintiff alleged that during the first two semesters of the agreement, he paid his salary plus a separate amount for benefits to the Foundation and beginning in fall 1998 he paid his salary plus an additional five percent administration fee. While the agreement was in effect, he was relieved from his primary faculty duties, but remained an employee of CSU, and was at all times listed as a faculty member. He occasionally returned to campus to teach a course, and the amount of his salary subject to the agreement was adjusted accordingly.

During the course of the agreement, plaintiff started and ran computer-related businesses, which he alleges permitted him to become more familiar with "leading edge industrial and technical applications" that benefitted CSU and resulted in his appointment to "Chair of the Department of Computer Science" in 2007 until his retirement.

During the course of the agreement, CSU continued to make contributions to plaintiff's PERS account and report his leave time to PERS as service credit. PERS sent plaintiff a June 30, 2012 "Annual Member Statement" showing that he had 32.396 years of service credit, which included the time he was on leave pursuant to the agreement. On June 5, 2012, plaintiff received a memorandum from CSU, acknowledging the agreement, but stating that during plaintiff's leave he did not perform any work for or do anything to benefit CSU, thus CSU had determined to deny plaintiff service credit for the period of the agreement, which resulted in a reduction of more than 10.5 years of service credit. Either CSU or the Foundation reported to PERS that plaintiff was not entitled to service credit for the agreement period. PERS removed the service credit for the agreement period from plaintiff's account.

Plaintiff alleged the agreement with CSU was written, but that he did not have a complete set of the contract documents. He attached the following "contract documents" to the complaint:

(1) "Proposal for Abdel-Moaty Fayek Buyout" which stated: "Dr. Derucher would like to propose buying out Dr. Fayek's Spring '05 Semester. [¶] Salaries and Wages $38,196 [¶] 5% Indirect 1,909.80 [¶] Total $40,105.80."

(2) a letter from plaintiff to Derucher that stated: "This is to finalize my buyout for this academic year, 2000-2001, per our agreement. [¶] Both semesters will be 100% buyout of my salary as well as the add-on of 5% for the contract administration. Salary based on Associate Professor as of 6/30/00 ($69,284) plus 3.5% General Salary Increase as of July 1, 2000 which is pending. Total salary for AY 2000-01 will be $71,757.00."

(3) a CSU, Chico Research Foundation sponsored programs proposal routing form dated February 15, 2000, showing a project title of "Academic Year Faculty Buyout for Moaty Fayek[,]" an entry for salaries and wages in the amount of $62,337.60, an entry for five percent indirect costs of $3,116.88, and an entry for total project costs of $65,454.48.

(4) an invoice from the Foundation to plaintiff for his spring 2006 buyout for a total of $21,348.

(5) a letter from the Foundation to plaintiff that stated: "This letter is to confirm that we have received a check from you (for the buyout of the Fall 1997 semester) in the amount of $41,532.24. The breakdown of that check is as follows: [¶] Associate Professor $31,704.00 [¶] Benefits 9,828.24 [¶] If you have any questions, please call."

Plaintiff filed a first amended complaint after defendants demurred to the original complaint. Defendants demurred to the first amended complaint, and the trial court sustained the demurrers with leave to amend. Plaintiff filed a second amended complaint alleging breach of contract, promissory estoppel, equitable estoppel, anticipatory repudiation, specific performance, and common count for money had and received against the CSU Trustees and the Foundation; declaratory and injunctive relief against the CSU Trustees, the Foundation, and PERS; and defamation against the CSU Trustees, Mike Ward, Sandra Flake, Paul Zingg, and the Foundation. Defendants again demurred.

The trial court sustained the demurrers without leave to amend, except to the common count cause of action.

Following the trial court's ruling on the demurrer, defendants CSU and Foundation tendered a Code of Civil Procedure section 998 offer of compromise on the common count cause of action. The offer was accepted, and judgment was entered against plaintiff on all causes of action except the common count, on which judgment was entered in plaintiff's favor in the amount of $27,000 in accordance with the offer of compromise.[2]

DISCUSSION

I

Waiver of Contract Remedies

Plaintiff's first cause of action alleged breach of contract against CSU and the Foundation. Defendants' arguments below were that the contract was unlawful, thus unenforceable, and the contract was too uncertain to be enforceable. The claim that the contract was unlawful is based on the argument the contract is in conflict with the provisions of Government Code section 20962, which provides that a year of service credit "shall be granted for service rendered and compensated in a fiscal year in full-time employment for . . . [o]ne academic year of service for persons employed on an academic year basis by the . . . California State University system . . . ." Since plaintiff did not render service for the period of time he was on leave, and since he repaid all of the compensation paid to him during that time, he did not meet the statutory requirements for earning service credit. Defendants' claim that the contract was uncertain was based on the fact that the contract was alleged to have been in writing, yet no copy of a contract was attached or incorporated by reference.

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[2] The common count cause of action sought payment in the amount of $29,348 for the administrative fee.

In response, plaintiff argued below that Government Code section 20898, which allows service credit when "the member is excused from working because of . . . leave of absence, with compensation," provided statutory authority for the service credit he claimed under the agreement. Plaintiff argued he was employed pursuant to CSU written policy, which stated: "CSU employment is defined as any employment compensated through CSU payroll, regardless of funding source (e.g., general fund, extension, lottery, CSU employment reimbursed by an auxiliary or other source)." Plaintiff claims the policy addresses his situation, where he was compensated through CSU payroll, and CSU was reimbursed by the Foundation. Plaintiff's claim that CSU was reimbursed by the Foundation is an admission that plaintiff was not being compensated as required by Government Code section 20898, since he repaid his salary to CSU through the Foundation.[3]

We need not address the parties' reprisal of these arguments on appeal, because defendants also argue plaintiff waived his right to appeal his contract-based claims by accepting the benefits of the judgment on the common count claim. We agree.

Plaintiff accepted defendants' offer to settle the cause of action for money had and received. Plaintiff alleged that upon receiving his salary from CSU, he paid his salary plus an additional administration fee to the Foundation pursuant to the agreement. Plaintiff's allegations for that cause of action stated: "If, as contended by Defendants, the Agreement is unenforceable, then, as an alternative pleading, Plaintiff alleges that Defendants . . . are indebted to him in the amount of $29,348 for the administrative fee

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[3] Although the point is not necessary to our decision, CSU's written policy does not appear to apply to the situation at hand. Rather, the written policy appears to describe a situation where CSU payroll compensates the employee, then CSU is reimbursed from some other source, not a situation where the CSU pays the employee, then the employee funnels the money back to CSU through some other source.

Defendants charged Plaintiff, which amount Plaintiff paid to Defendants at their special instance & request."

" ' "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. [Citations.]" [Citation.] The rule is based on the principle that "the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other. [Citation.]" [Citation.]' [Citation.] Put another way, 'acceptance by the appellant of the benefits of a judgment constitutes an "affirmance of the validity of the judgment against him." [Citation.]' [Citation.] 'Although the acceptance must be clear, unmistakable, and unconditional [citation], acceptance of even a part of the benefit of a judgment or order will ordinarily preclude an appeal from the portion remaining. [Citation.]' " (*Satchmed Plaza Owners Assn. v. UWMC Hospital Corp.* (2008) 167 Cal.App.4th 1034, 1041-1042.)

Where only part of the benefit of a judgment is accepted, the ability to appeal depends on whether the portion appealed from is a severable and independent judgment. " '[O]ne may appeal from a portion of a severable and independent judgment while accepting the benefits of the unaffected remainder of the judgment. [Citations.]' " (*Satchmed Plaza Owners Assn. v. UWMC Hospital*, *supra*, 167 Cal.App.4th at p. 1042.) The portion of the judgment appealed from is severable and independent if a reversal will have no effect on the appellant's right to the benefit he has accepted. (*Steinman v. Malamed* (2010) 185 Cal.App.4th 1550, 1555.)

Plaintiff's complaint admits that he is entitled to the fee only in the event the agreement is unenforceable. The judgment on the cause of action for money had and received is not a severable and independent part of the judgment, because if we were to overrule the demurrer and plaintiff were to prevail on his breach of contract claim, he then would *not* be entitled to the sum he has already accepted for the return of the administrative fee. If the agreement were enforceable, CSU would be entitled to keep the

money for administration under the agreement. Reversal would have a definite effect on plaintiff's right to the benefit he has accepted.

This waiver applies to more than just plaintiff's breach of contract cause of action. It applies to plaintiff's cause of action entitled "Anticipatory Repudiation" because the repudiation referred to in that cause of action is the anticipatory breach of the contract.

The waiver also applies to plaintiff's promissory estoppel cause of action. "Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) It "was developed to do rough justice when a party lacking contractual protection relied on another's promise to its detriment." (*Id*. at p. 315.) There is no distinction between the damages for breach of contract and the damages awarded for promissory estoppel. (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 640.) Punitive damages are not recoverable under a promissory estoppel theory. (*CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 277.) Thus, if plaintiff has waived recovery on the contract, he has waived recovery under a promissory estoppel theory. As for equitable estoppel, plaintiff's third cause of action, California does not recognize an independent cause of action for equitable estoppel, as the doctrine acts defensively only. (*Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1463.)

The demurrer to plaintiff's declaratory relief cause of action was properly sustained. The declaratory relief cause of action alleged to seek "a judicial determination that Plaintiff entered into an enforceable agreement which has resulted in approximately an additional 10.5 years of service credit that was earned but retroactively reduced by Defendants." This declaratory relief cause of action is thus based on the contract, and plaintiff has waived any action based on the contract. Furthermore, declaratory relief operates prospectively. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 869 p. 284.)

A declaratory relief action based on a contract must be pursued in advance of a breach, "so that parties may know their rights and obligations where a controversy arises before a breach or violation occurs." (*Kessloff v. Pearson* (1951) 37 Cal.2d 609, 613.) Where the breach as already occurred, no action for declaratory relief lies.

Plaintiff's cause of action for injunctive relief is also based on the contract. He sought injunctive relief to restore the service credit he claims to have earned under the contract. However, an injunction cannot be granted to prevent the breach of a contract that cannot be specifically enforced. (Code Civ. Proc., § 526, subd. (b)(5).) "Specific performance of a contract will not be compelled when an adequate remedy exists at law, and if monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction cannot be granted. [Citations.] Generally, where damages afford an adequate remedy by way of compensation for breach of contract, equitable relief will be denied." (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306.) There can be no specific performance of the contract here because plaintiff has an adequate remedy at law (the dollar value of approximately 10.5 years of service credit), and monetary damages would afford him adequate relief, had he not accepted the benefits of a dependent part of the judgment.

Thus, by accepting defendants' offer to compromise the cause of action for money had and received, plaintiff has waived his right to appeal the judgment dismissing causes of action one (breach of contract), two (promissory estoppel), three (equitable estoppel), four (declaratory relief), five (injunctive relief), seven (anticipatory repudiation), and eight (specific performance). Plaintiff has dismissed causes of action six (contracts clause violation), ten (violation of California Constitution), and eleven (violation of Government Code).

II

Defamation

The ninth cause of action for defamation was alleged against CSU, the Foundation, and the individual defendants. For the defamation cause of action against CSU, the Foundation, and the individual defendants Mike Ward, Sandra Flake, and Paul Zingg, plaintiff alleged that "Defendants" alleged "he breached the self-funded buyout contract concerning PERS service credit and that Plaintiff did not perform any work for, or of benefit to [CSU], during the [agreement]." The second amended complaint also alleged: "On or about June 5, 2012, Plaintiff received a written memorandum from the Chief of Staff of [CSU]'s President, acknowledging the AGREEMENT by noting that Plaintiff has been on a ' "self-funded buy out" accruing CalPERS service credit.' . . . The memo falsely claimed that during his leave Plaintiff did not perform any work for or do anything to benefit [CSU]."

In response to CSU's argument below that the defamation cause of action in the first amended complaint was too vague, plaintiff explained that the defamation allegations are drawn from the June 5, 2012 written memorandum from the CSU chief of staff to plaintiff that was alleged in the complaint. Plaintiff stated: " 'Plaintiff received a written memorandum on or about June 5, 2012 from the Chief of Staff of [CSU]'s President, claiming that during his leave Plaintiff did not perform any work for, or do anything to benefit [CSU]' (FAC, ¶ 13). The above allegations identify the defamation as they claim that Plaintiff breached the Agreement because he did not perform ANY services of value, did not perform ANY work for, or work of ANY benefit to CSU. . . . [¶] . . . [¶] Defendants know precisely the words used in various written communications including those alleged in the FAC. Defendants are in possession of, and their representative authored, the June 5, 2012 memorandum which included the material set forth in the FAC. It is not necessary for Plaintiff to append the memorandum to the

complaint . . . . [¶] Plaintiff alleges that the defamatory statements were also published verbally."[4]

" 'Defamation requires the intentional publication of a false statement of fact that has a natural tendency to injure the plaintiff's reputation or that causes special damage.' [Citation.] The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97.)

The memorandum to plaintiff was not defamation. There was no publication when the memorandum was sent to plaintiff. Publication requires a communication to a third person, and plaintiff is not a third person. (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 145-146.)

As to any possible discussions or circulation of the memorandum among CSU staff, the alleged libel contained within the memorandum must have " ' "a natural tendency to injure a person's reputation, either generally, or with respect to his occupation[,]" ' " in order to be defamatory. (*Cameron v. Wernick* (1967) 251 Cal.App.2d 890, 893.) In determining whether the statement meets the test of being defamatory, we look at both the statement itself and the context and object of the publisher. (*Ibid*.) The bare statements that plaintiff did not perform any service or work for CSU during the period of the agreement does not on its face injure plaintiff in his reputation or occupation. No reasonable reader or hearer would perceive in these statements a meaning that tended to injure plaintiff's reputation generally or with respect

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4 The court takes judicial notice of the documents filed in the trial court pursuant to Evidence Code section 452, subdivision (d). In reviewing the sufficiency of the complaint we consider matters which may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

to his occupation. Thus, they are not defamatory at all. (*Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1226.) Neither would the context of the memorandum lead a reader to perceive a defamatory meaning. In the context of the memorandum, which was for the purpose of communicating plaintiff's disqualification for service credit during the time he was not working for CSU, the statements made did not have the tendency to injure plaintiff's reputation with respect to his occupation or generally. The statement was not a judgment regarding plaintiff's work ethic, but merely a statement indicating the necessary requirements for PERS service credit had not been met. The statements were not defamatory, nor were they reasonably susceptible to a defamatory meaning.

Alleging a breach of contract is also not defamatory per se. (*Bartholomew v. YouTube, LLC.*, *supra*, 17 Cal.App.5th at p. 1233.) Consequently, the statement is not actionable unless plaintiff alleges and proves facts showing he has suffered special damages as a result of the statement. (*Id.* at p. 1226.) Special damages are "all damages that plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and no other." (Civ. Code, § 48a, subd. (d)(2).) Special damages must be specifically pled, and plaintiff's general allegation that he has suffered special damages is insufficient. (*Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 791-792.)

Although not necessary to our decision, we further conclude such communications among CSU, the Foundation, and their staff fall within the common interest privilege of Civil Code section 47, subdivision (c).[5] The common interest privilege may be defeated

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[5] Subdivision (c) provides in part that a privileged publication is one made: "In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. . . ."

by a showing of actual malice. Actual malice is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and acted in reckless disregard of the plaintiff's rights. (*McGrory v. Applied Signal Technology, Inc*. (2013) 212 Cal.App.4th 1510, 1538.)

Although privilege is an affirmative defense, where the existence of the privilege is revealed on the face of the complaint, it may be asserted in a demurrer, and the complaint must allege facts constituting actual malice. (*Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 538.) The second amended complaint alleged plaintiff was defamed when defendants made statements "that he breached the self-funded buyout contract concerning PERS service credit and that Plaintiff did not perform any work for, or of benefit to [CSU], during the [agreement]." The second amended complaint also alleged that on June 5, 2012, "Plaintiff received a written memorandum from the Chief of Staff of [CSU]'s President . . . falsely claim[ing] that during his leave Plaintiff did not perform any work for or do anything to benefit [CSU]." This indicates the basis of the defamation claim is the memorandum. If there is any doubt, that doubt is resolved by plaintiff's memorandum of points and authorities in opposition to the demurrer to the first amended complaint, which argued the defamation allegation was sufficiently specific, referencing the June 5, 2012 memorandum. As indicated above, we have taken judicial notice of the documents filed below. Here, the privilege is revealed on the face of the complaint and those matters judicially noticed by this court, thus the complaint is required to allege facts constituting actual malice.

The complaint alleged no facts to show hatred or ill will, but plaintiff claims there were sufficient facts to show that defendants lacked reasonable grounds for believing in the truth of the publication. He claims the alleged facts that defendants proposed the agreement and renewed it, and that Dr. Derucher signed off on the agreement as being "consistent with the educational and professional objectives of the Project Director's

academic department" were sufficient to give rise to an inference of actual malice. We disagree. Context matters. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385-386.) The statements at issue must be viewed in the context of the memorandum, which was informing plaintiff that he would not receive service credit for the period of time he did not provide work to CSU as a faculty member. In this context there are no facts showing defendants lacked reasonable grounds for believing in the truth of the publication.

Although plaintiff alleged actual malice, the second amended complaint did not allege facts that would establish ill will towards him, or that defendants lacked a reasonable belief that the statements in their internal communications regarding his qualifications for service credit were true. The complaint must set forth fact showing that actual malice existed at the time the communication was published. (*Locke v. Mitchell* (1936) 7 Cal.2d 599, 603.) Conclusory allegations of malice are insufficient. (*Ibid*.) Although not necessary to our decision that the demurrer was properly sustained to the defamation cause of action, we conclude the complaint was insufficient for failure to plead facts showing actual malice. The trial court properly sustained the demurrer to the defamation cause of action.

III

Claims Against PERS

Plaintiff named PERS as a defendant on his causes of action for declaratory and injunctive relief. His allegation for declaratory relief contended that a controversy has arisen concerning the parties' respective rights and duties relied to the service credit earned by plaintiff pursuant to his agreement with CSU. Plaintiff's injunctive relief cause of action sought to enjoin PERS from reducing his service credit. Arguably, because both causes of action are premised on benefits he would have received had the alleged contract been enforceable, he has waived his claims against PERS by accepting the benefits of a dependent part of the judgment.

Assuming the judgment in favor of PERS is independent from the settlement, we nevertheless conclude the demurrer was properly sustained in favor of PERS.

A public employee's right to retirement benefits through PERS is "wholly statutory." (*Hudson v. Posey* (1967) 255 Cal.App.2d 89, 91-92.) PERS must follow the law. (*City of Pleasanton v. Board of Administration*, *supra*, 211 Cal.App.4th at p. 544.) "PERS's fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees." (*Ibid*.) The alleged agreement does not change the statutory requirements for earning service credit. *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194 held that "[s]tatutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements." (*Id.* at p. 201.) The same applies to individual agreements between an employer and employee. Thus, unless the statutes governing PERS can be construed to allow the accrual of service credit under the terms of the alleged agreement, PERS has no obligation to recognize such service credit.

When construing legislation, " 'we first consult the words themselves, giving them their usual and ordinary meaning.' [Citation.] As always, it is legislative intent that controls, and a statute's 'plain meaning' is adopted because courts trustfully assume the Legislature uses words in their usual sense and does not attach private meanings to commonly used words. Statutory interpretation begins with the text and will end there if a plain reading renders a plain meaning: a meaning without ambiguity, uncertainty, contradiction, or absurdity. If a plain reading of the statute fails, we must look further for legislative intent, knowing that words are inexact symbols without intrinsic significance and that the Legislature may intend an unusual meaning, whether by design or inadvertence. 'The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.]" (*Oden v. Board of Administration*, *supra*, 23 Cal.App.4th at pp. 201-202.)

Government Code section 20962 states that service credit is granted for "service rendered and compensated." Plaintiff argues his leave of absence was "service" to CSU because by starting his own computer-related businesses he enhanced his knowledge and skills to CSU's benefit. He argues he was compensated because he received payment from CSU's payroll, and CSU's written policy stated that "CSU employment is defined as any employment compensated through CSU payroll, regardless of funding source (e.g., general fund, extension, lottery, CSU employment reimbursed by an auxiliary or other source)." He argues that what he did with his compensation after he received it is "immaterial."

We reject these assertions as a matter of law. When plaintiff ran his businesses, from which he profited, he was not rendering service to CSU as a faculty employee. Furthermore, he did not receive compensation for his alleged service because he repaid whatever compensation he received. It is *not* immaterial that he repaid his compensation to the Foundation, when this apparently was a requirement of the alleged agreement. The plain meaning of the term "service rendered and compensated" in the context of the PERS legislation must mean that service is actual work done for the employer for which the employer pays the employee with no expectation of reimbursement.

Plaintiff also argues that service credits pursuant to the alleged agreement were "specifically authorized by Government Code section 20898." That section provides: "In computing the service with which a member is entitled to be credited under this part, time during which the member is excused from working because of holidays, sick leave, vacation, or leave of absence, with compensation, shall be included." Plaintiff's claim is that he was on a leave of absence with compensation. He was not.

First, plaintiff's claim that he was on a leave of absence and excused from working is at odds with his claim that he was rendering service to CSU during that time. Second, the inclusion of the term "leave of absence" in Government Code section 20898 must be construed in conjunction with its inclusion with sick leave and vacation (*noscitur*

a sociis).[6] A nine-year absence during which plaintiff worked not at CSU, but at his own businesses is not akin to an absence for vacation and sick leave, which are much shorter in duration, and to which all employees are entitled. "The legislative intent was to assure that an employee, entitled to certain time off from work, was nevertheless treated as if he had worked continuously." (*Santa Monica Police Officers Assn. v. Board of Administration* (1977) 69 Cal.App.3d 96, 99-100.) Plaintiff cannot claim that a nine-year absence during which he worked not for CSU, but for his own businesses, should be treated as if he had worked at CSU continuously. Third, as we concluded above, plaintiff did not receive compensation from CSU, thus Government Code section 20898 is not applicable.

The entire alleged agreement appears to be a scheme devised precisely to allow plaintiff to circumvent the requirements of Government Code section 20962 and accrue service credit toward retirement without rendering services for which he was compensated. "The terms and conditions relating to employment by a public agency are strictly controlled by statute or ordinance, rather than by ordinary contractual standards . . . ." (*Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 134; *Los Angeles v. Los Angeles Bldg. & Constr. Trades Council* (1949) 94 Cal.App.2d 36, 45.) The alleged agreement is at odds with the statutory requirements for awarding service credit to public employees for work performed for a public agency and for which compensation is received from a public agency. Accordingly, there is no basis upon which to grant declaratory or injunctive relief in favor of plaintiff and against PERS.[7]

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[6] "The commonsense canon of *noscitur a sociis* counsels that a word is given more precise content by the neighboring words with which it is associated." (2A Sutherland, Statutory Construction (7th ed. 2008 supp.) § 47:16, p. 74.)

[7] PERS's request for judicial notice of the start and end dates of the high technology boom is denied.

DISPOSITION

The judgment is affirmed.

/s/
BLEASE, J.

We concur:

/s/
RAYE, P. J.

/s/
RENNER, J.